(22)

No. 90-1014

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ROBERT E. LEE, INDIVIDUALLY AND AS PRINCIPAL OF NATHAN BISHOP MIDDLE SCHOOL, *et al.*,
Petitioners,

v.

DANIEL WEISMAN, ETC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR AMERICANS FOR RELIGIOUS LIBERTY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether government sponsorship of invocational prayers tends to degrade religion, and therefore violates the Establishment Clause.

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INTEREST OF THE AMICUS CURIAE *

Americans for Religious Liberty is a non-profit, non-denominational educational organization dedicated to preserving the American constitutional tradition of religious freedom. Its members and officers have been parties in numerous lawsuits challenging practices that implicate

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* This brief is filed with the written consent of the parties, pursuant to Supreme Court Rule 37.

the Establishment Clause and it has appeared before this Court as an amicus curiae in several Establishment Clause cases, including most recently *Board of Education v. Mergens*, 110 S. Ct. 2356 (1990).

SUMMARY OF ARGUMENT

"[T]his Court has never relied on coercion alone as the touchstone of Establishment Clause analysis." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 628 (1989) (O'Connor, J., concurring). In *Everson v. Board of Education*, 330 U.S. 1 (1947), the case recognized as the beginning of this Court's modern Establishment Clause jurisprudence, the Court concluded that in addition to preventing government coercion, the clause also prohibits government from aiding religion in general, participating in religious activities and influencing a person with respect to his religious beliefs and practices. For over four decades after *Everson* this Court consistently and repeatedly affirmed that coercion is not a necessary element of any claim under the Establishment Clause. The most recent reaffirmation of this view came a mere two terms ago. *County of Allegheny, supra*, 492 U.S. at 597-98 n.47.

Besides respect for its own precedents, there are several other reasons why this Court should conclude that government coercion is not the only type of conduct prohibited by the Establishment Clause. To begin, "the purposes underlying the Establishment Clause go much further than that." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). The Founders wanted to guard religion from any threat to its integrity by preventing government from engaging in contentious endorsements of religious practices or institutions. As James Madison argued, such endorsements are impermissible because they imply "that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil Policy." Memorial and Remonstrance

Against Religious Assessments, para. 5 (1785). Moreover, if coercion is a necessary element of an Establishment Clause violation, then this clause adds nothing to the Free Exercise Clause. "It cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madision*, 5 U.S. (1 Cranch) 137, 174 (1803). Finally, employing coercion as the litmus test will not make Establishment Clause decisions any easier. The elasticity of the concept of coercion as it has been applied by federal courts and agencies reveals such hopes to be illusory. *E.g., Culombe v. Connecticut*, 367 U.S. 568, 601 (1961) (precise definition of coercion in context of criminal confessions "impossible"), *B & D Plastics, Inc.*, 302 N.L.R.B. No. 33 (March 29, 1991) (company-sponsored cookout coercive in context of approaching union representation election).

Once it is accepted that the Establishment Clause not only prohibits coercion, but also prohibits the state from compromising the integrity of religion, it is clear that the judgment of the court of appeals should be affirmed. In a religiously diverse society, the integrity of religion is compromised by having the government sponsor religious ceremonies, such as prayers at public school graduations. To avoid offense to religious minorities, the prayers must be scrutinized for their "inclusiveness." Judicial scrutiny of other government-sponsored religious ceremonies has resulted in ministers having to pledge to censor themselves. *Kurtz v. Baker*, 644 F. Supp. 613 (D.D.C. 1986). Court-approved generic prayers are demeaning to religion. The "complete separation between the state and religion is best for the state and best for religion." *Everson, supra*, 330 U.S. at 59 (Rutledge, J., dissenting).

ARGUMENT

I. COERCION IS NOT A NECESSARY ELEMENT OF AN ESTABLISHMENT CLAUSE VIOLATION

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court articulated a three-pronged standard for determining whether government action can be upheld in the face of an Establishment Clause challenge. As stated in *Lemon*, to pass muster under the Establishment Clause, a "statute must have a secular legislative purpose . . . its principal or primary effect must be one that neither advances nor inhibits religion . . . and the statute must not foster 'an excessive governmental entanglement with religion.'" *Id.* at 612-13. This teaching was not the product of a sudden revelation. Instead, the *Lemon* "test" was the result of a careful refinement of principles set forth in earlier cases, including the principle that the Establishment Clause forbids any sort of aid or support of religion (or irreligion) unless the aid or support is incidental to achievement of a legitimate secular end. *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963). Similarly, "subsequent decisions further have refined the [*Lemon*] definition of governmental action that unconstitutionally advances religion," so that government action that "has the purpose or effect of endorsing religion" has been recognized as impermissible. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592 (1989). *See also Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982) (government action that provides "symbolic benefit" to religion is unconstitutional).

Petitioners wish to jettison *Lemon*.

Boldly reshaping this Court's precedents and the history surrounding the Establishment Clause, petitioners contend that the "First Amendment was designed by the Framers to protect only against [government coercion]." Petitioners' Brief at 14. Petitioners have mistaken a thread for the entire design. While prevention of government coercion is undoubtedly one of the principal purposes of the Establishment Clause, it is certainly not the only purpose, nor is coercion the only type of conduct prohibited by the Establishment Clause.

Despite petitioners' suggestion to the contrary, this Court has consistently recognized that coercion is not a necessary element of an Establishment Clause violation. *Everson v. Board of Education*, 330 U.S. 1 (1947), is regarded as the beginning of this Court's "modern Establishment Clause jurisprudence." *County of Allegheny, supra*, 492 U.S. at 656 (1989) (Kennedy, J., concurring in the judgment and dissenting in part). In *Everson*, this Court observed:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion . . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and *vice versa*.

Id. at 15-16. Thus, while *Everson* states the obvious, that coercion violates the Establishment Clause, it also states that coercion is but one of several types of constitutionally infirm conduct. The clause also prohibits government from aiding religion in general, sponsoring religious activities or ceremonies and influencing (in addition to coercing) a person with respect to his religious beliefs and practices.

Similarly, in *McGowan v. Maryland*, 366 U.S. 420 (1961), the Supreme Court noted that the Sunday closing laws at issue did not violate the Establishment Clause because, *inter alia*, they did not involve any "direct cooperation between state officials and religious ministers."

Id. at 452. While absence of government coercion of religious beliefs was an additional reason for upholding the laws, it clearly was not the only reason—again, contrary to what petitioners suggest. *Cf.* Petitioners' Brief at 34-35. Justice Frankfurter expanded on the Court's reasoning, pointing out that "the constitutional prohibition of religious establishment is a provision of more comprehensive availability than the guarantee of free exercise." *Id.* at 467 (Frankfurter, J., separate opinion). As a result:

> The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. . . . Neither the National Government nor . . . a State may, *by any device*, support belief or the expression of belief for its own sake, whether from conviction of the truth of that belief, or from conviction that by the propagation of that belief the civil welfare of the State is served . . . .

Id. at 465-66 (emphasis added).

Of course, as petitioners concede, the Court in *Engel v. Vitale*, 370 U.S. 421, 430 (1962), unequivocally rejected the view that coercion is a necessary element of an Establishment Clause violation:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.

And the view that government coercion is but one of the evils forestalled by the Establishment Clause, so that state support of religion that falls short of actual coercion of religious dissenters can constitute an Establishment Clause violation, has been repeatedly emphasized since

Engel. E.g., Wallace v. Jaffree, 472 U.S. 38, 60-61 (1985).

This brief review of rulings by this Court suffices to establish that "this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis." *County of Allegheny, supra*, 492 U.S. at 628 (O'Connor, J., concurring). Petitioners and their amici wish to effect a revolution in constitutional jurisprudence, and this is a goal that their highly selective treatment of this Court's decisions cannot mask. *See* Petitioners' Brief at 34-35; Brief for the United States at 19 n.18.

Petitioners and their amici also advance a similarly limited view of the history surrounding the adoption of the Establishment Clause. There is no need for a point-by-point rebuttal of their historical analysis.[1] Consider just one issue of historical interpretation: the significance of the Memorial and Remonstrance Against Religious Assessments written by James Madison. As the United States points out, this document has long been regarded as important for understanding the reasoning behind the Establishment Clause. Brief for the United States at 16-17. It is unfortunate, therefore, that petitioners and their amici narrowly focus on only one of the arguments in the Memorial and Remonstrance. No one will dispute that Madison and the other Founders who championed religious freedom were concerned with government coercion of religious minorities. However, to characterize the Memorial and Remonstrance as "a bill of particulars" against coercion, Petitioners' Brief at 21, is to provide a tendentious summary of its contents.

Even a cursory reading of the Memorial and Remonstrance reveals that Madison was concerned with much

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[1] There is no need for a point-by-point rebuttal because, among other reasons, petitioners' underlying theory regarding the significance of contemporaneous historical events for understanding the Establishment Clause is misconceived. *See infra*, pp. 12-15.

more than the individual's freedom from coercion. Prominent among his concerns was the need to guard religion from any sort of threat to its integrity. Madison regarded the strict separation of Church and State as being necessary to maintain "the purity and efficacy of Religion." Memorial and Remonstrance, para. 7 (quoted in *Everson v. Board of Education*, 330 U.S. 1, 63-72 (1947) (Appendix to dissenting opinion of Justice Rutledge)). Support of religion by government is wrong because it would "weaken in those who profess this Religion a pious confidence in its innate excellence," as well as "foster[ing] in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits." *Id.*, para. 6. Endorsement of religious beliefs and practices, symbolic or otherwise, is impermissible because it would imply "that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil Policy." *Id.*, para. 5. These and other passages from the Memorial and Remonstrance demonstrate that Madison wanted to protect religious beliefs and practices from government influence of *any* sort. It is no surprise, therefore, that this Court and numerous scholars, after reviewing the Memorial and Remonstrance, have concluded that, although a purpose of the Establishment Clause is to protect religious minorities from coercion, "the purposes underlying the Establishment Clause go much further than that." *Engel*, 370 U.S. at 431. The Establishment Clause also serves to protect religion—even from well-intentioned, but officious, "accommodation" of religious practices—as "a union of government and religion tends . . . to degrade religion." *Id.* *See* Van Alstyne, *What Is "An Establishment of Religion?,"* 65 N.C.L. Rev. 909, 915 (1987) ("The state that appropriates the sacred (*i.e.*, Latin crosses, invocations . . .) disregards Madison's pleas for civil restraint"). *See also* G. Wills, *Under God: Religion and American Politics* 375-77 (1990); Conkle, *Towards a General Theory of the Establishment Clause*, 82 Nw. U.L.

Rev. 1113, 1181 (1988); Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 Colum. L. Rev. 1463, 1476 (1981); *see also Marsh v. Chambers*, 463 U.S. 783, 804 (1983) (Brennan, J., dissenting) (one purpose of Church-State separation "is to prevent the trivialization and degradation of religion").

Besides lacking support in this Court's precedents and in the history surrounding the Establishment Clause, petitioners' theory suffers from both logical and practical defects. Its logical defect is that "[t]o require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy." *County of Allegheny, supra*, 492 U.S. at 628 (O'Connor, J., concurring). *See* Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 922 (1986) ("If coercion is also an element of the establishment clause, establishment adds nothing to free exercise"). The Framers wrote two religion clauses into the first amendment; while the protections afforded by both clauses undoubtedly coincide to some extent, they cannot have the exact same meaning. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect").

With respect to practical defects, the coercion "test" favored by petitioners and their amici, although touted as a means for avoiding the alleged confusion caused by the Court's traditional Establishment Clause doctrine, would not be easy to apply. The United States suggests that the issue of coercion is relatively uncomplicated because it has been addressed in other constitutional contexts. Brief for the United States at 22-23. However, the Court has encountered substantial difficulty in resolving questions of coercion, even in the limited area of criminal confessions. As one legal scholar has noted, the Court has

"struggled . . . to define appropriate constitutional limitations on the interrogation methods used by police in light of the capacity of the individual possessed of free will to withstand coercion." S. Saltzburg, *American Criminal Procedure* 426 (1984). The Court has acknowledged that it must review "the totality of the circumstances" before reaching any conclusions on the voluntariness of a confession, *e.g.*, *Fikes v. Alabama*, 352 U.S. 191, 197 (1957) and these circumstances are broadly defined to include such facts as the education of the accused, *compare Payne v. Arkansas*, 356 U.S. 560 (1958) (confession involuntary as accused had a fifth grade education) *with Crooker v. California*, 357 U.S. 433 (1958) (confession voluntary as accused was a first year law student), the skills of the interrogator, *Leyra v. Denno*, 347 U.S. 556 (1954), the fatigue of the accused, *Spano v. New York*, 360 U.S. 315 (1959), and the age of the accused, *Gallegos v. Colorado*, 370 U.S. 49 (1962).[2]

Culombe v. Connecticut, 367 U.S. 568 (1961) exhibits many of the frustrations felt by the Court in confronting the issue of coerced confessions. The opinion of the Court expressed the views of but two Justices; there were three concurring opinions and a dissent. Justice Frankfurter, writing for the Court, conceded that defining coercion presented "a recurring problem," *id.* at 569, and candidly stated "[i]t is impossible for this Court . . . to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed . . . in obtaining confessions." *Id.* at 601. In part,

[2] Curiously, although the United States makes reference to this Court's criminal confession cases as an example of application of the concept of coercion, the United States also states that "no special rule for children is justified" in the Establishment Clause context. Brief for the United States at 22-23 n.21, 27. Since age is indisputably relevant in assessing an individual's autonomy, a "special rule for children" would be required were coercion the key element in an Establishment Clause violation.

the problem derives from the imprecise concept of a voluntary action. As Justice Frankfurter explained:

> The notion of 'voluntariness' is itself an amphibian. It purports at once to describe an internal psychic state and to characterize that state for legal purposes.

Id. at 604-05.

Furthermore, a glance at how the concept of coercion has been applied in fora other than this Court instantly reveals that the concept is much more elastic than petitioners and their amici suggest. For example, the National Labor Relations Board has concluded that an employer's cookout two days before a union representation election could coerce employees to vote for the employer, even though attendance at the cookout was voluntary. *B & D Plastics, Inc.*, 302 N.L.R.B. No. 33 (March 29, 1991).[3]

From the foregoing, it is readily apparent that assessing the coercive effect of state-sponsored religious ceremonies presents substantial difficulties. Using coercion as the Establishment Clause "test" will result in as many, if not more, claims of inconsistent adjudication and unprincipled results as use of the standard articulated in *Lemon* and refined by later decisions. "[I]t seems unlikely that 'coercion' identifies the line between permissible and impermissible religious displays any more brightly than does 'endorsement.'" *County of Allegheny, supra*, 492 U.S. at 650 n.6 (Stevens, J., concurring).

In short, petitioners' advocacy of coercion as a necessary element of an Establishment Clause violation lacks historical foundation, impugns more than four decades of this Court's decisions, renders the Establishment Clause

[3] Defining "voluntary action" and "coercion" has proved no less troublesome outside the confines of the courtroom. Professional psychologists and philosophers differ widely in their understanding of these concepts. *See, e.g.*, T. Beauchamp and R. Faden, *A History and Theory of Informed Consent* 338-39 (1986).

redundant and is unworkable. The Court should reject petitioners' argument—as it unequivocally rejected an identical argument a mere two terms ago. *County of Allegheny, supra*, 492 U.S. at 597-98 n.47.

II. THE GOVERNMENT'S USE OF RELIGION IN CEREMONIES DOES NOT ACCOMMODATE, BUT RATHER DEMEANS RELIGION

Petitioners and their amici rely heavily on the Founders' use of the powers of government to institute or support some religious ceremonies and practices as an argument for the constitutionality of the graduation prayers at issue here. They argue that this history shows that government may accommodate religion through non-coercive religious ceremonies and practices.

Petitioners' reliance on specific practices initiated or condoned by the Framers is misplaced. "Our use of the history of their time must limit itself to broad purposes, not specific practices." *Abington School District, supra*, 374 U.S. at 241 (Brennan, J., concurring). Scholars have concluded that the Framers of the Constitution desired the intent of the Constitution to govern, as evidenced by its language, but not their own particular intentions, that is how they applied the Constitution under the circumstances of their time. *E.g.*, Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985). The Court has at least tacitly accepted this argument because it has condemned practices accepted by the Framers of the Bill of Rights or of subsequent constitutional amendments. *E.g.*, An Act for the Punishment of Certain Crimes against the United States, § 16, 1 Stat. 116 (1790) (law enacted by First Congress providing for public whipping of some thieves); Act of July 23, 1866, 14 Stat. 216 (law, enacted one week after Congress proposed fourteenth amendment, providing for the racial segregation of District of Columbia schools).

The circumstances, in particular the religious circumstances, of our time are profoundly different from the time of the Founders. The Founders "knew differences chiefly among Protestant sects," whereas "[t]oday the Nation is far more heterogenous religiously, including as it does substantial minorities not only of Catholics and Jews, but as well of those who worship according to no version of the Bible and those who worship no God at all." *Abington School District, supra*, 374 U.S. at 240. Practices arguably consistent with the underlying values of the Establishment Clause during the time period of the Founders may not be consistent with those values today. They certainly cannot be justified by the rationale originally offered for their constitutionality.

In this regard, it is worthwhile examining the institution of the congressional chaplaincies in some detail. Petitioners and their amici place special emphasis on the institution of the chaplaincies and on this Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), which upheld the chaplaincies. However, the arguments given for the constitutionality of that institution during the early history of our country are not ones that petitioners would dare to advance today.

As stated above, the United States was much more religiously homogeneous during the country's early years than it is today. Because of the lack of religious diversity in this country at the time of the First Congress, some of the Framers understandably believed that their concern for maintaining the integrity of religion by avoiding contentious endorsements of religious practices and institutions would not necessarily be disserved as long as the government remained neutral among the sects (almost exclusively Protestant) then prevalent in the country. Some of the Framers, therefore, had no quarrel with congressional chaplaincies that fairly represented what diversity there was in religious viewpoints. It is noteworthy in this regard that the early congresses tried

to avoid any appearance of favoring one (Protestant) denomination over another by expressly providing, through concurrent resolutions, that the chaplains of the Senate and the House were to be of different denominations. 1 Journal of the Senate 12 (1789); 1 Journal of the House of Representatives 16 (1789).[4]

That the chaplaincies would be permissible as long as they maintained neutrality among Protestant or Christian sects was also the view of the House Judiciary Committee that in 1854 upheld the constitutionality of the congressional chaplaincies in the face of several petitions that requested that the practice be discontinued. The report of the House Judiciary Committee states:

> At the time of the adoption of the constitution and the amendments, the universal sentiment was that Christianity should be encouraged—not any one sect. Any attempt to level and discard all religion, would have been viewed with universal indignation. The object was not to substitute Judaism or Mahomedanism, or infidelity, but to prevent rivalry among sects to the exclusion of others.

H.R. Rep. No. 124, 33d Cong., 1st Sess., at 6.[5]

Petitioners' narrow focus on practices accepted or instituted by the Framers is therefore clearly misguided

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[4] The resolutions did not expressly state that the chaplains were to be from Protestant denominations, but that was how the resolutions were understood. All the chaplains of the House and Senate have been Christian; in the early years, they were all Protestant. Office of the Senate Chaplain, Chaplains of the U.S. Senate, April 25, 1789 to Date; *History of the United States House of Representatives*, H.R. Doc. No. 250, 89th Cong., 1st Sess. 212 (1965). In 1845, when the possibility of a Mormon serving as a chaplain was raised (in jest), the proposal provoked ridicule and laughter. Cong. Globe, 29th Cong., 1st Sess. 40 (1845).

[5] The same report observed that "[i]n this age, there can be no substitute for Christianity; that in its general principles, is the great conservative element on which we must rely for the purity and permanence of free institutions." *Id.* at 8.

and actually proves too much. Petitioners rely on these practices for the argument that non-coercive accommodation of religion is permissible. If they were truly faithful to the specific intentions of many of the Framers they would be contending—much to the consternation of Rabbi Gutterman, who gave the invocation at issue here—that the state may support religion as long as it is the Christian religion. As the nineteenth century legal scholar Joseph Story observed, many of the Framers believed "that Christianity ought to receive encouragement from the state" provided that the state's support did not engender "rivalry among Christian sects." 2 J. Story, *Commentaries on the Constitution of the United States* § 1874, p. 593 and § 1877, p. 594 (1851). There is also an unresolvable tension between the petitioners' contention that the Establishment Clause forbids coercion and their contention that the state can accommodate religion through certain ceremonial practices or institutions such as the congressional chaplaincies, because the chaplaincies were (and are) undeniably coercive: they were (and are) supported by tax dollars. Indeed, the chaplains' initial salary of five hundred dollars per year "compare[d] favorably with the Congressmen's own salaries of $6 for each day of attendance." *Marsh*, 463 U.S. at 788 n.7. Petitioners cannot have it both ways. They cannot rely on those aspects of the Framers' practices that are acceptable to contemporary sentiments while ignoring those aspects that are anachronistic.

Focusing on the congressional chaplaincies is useful for making another point. The state's use of religion for ceremonial purposes degrades religion; it does not accommodate religion.

The use of cookie-cutter prayers is one symptom of "civil religion." Government-sponsored invocational prayer is necessarily framed in the broadest and blandest possible terms, in an attempt to appeal to everyone. Petitioners unwittingly stumble upon the truth when they state, on Madison's authority, that boredom resulted from

the congressional chaplains' tepid daily offerings in the House and Senate. Petitioners' Brief at 32 n.33 (Madison observed that the daily devotions had "degenerat[ed] into a scanty attendance, and a tiresome formality").

But while use of tepid generalities consistent with Christianity may have been sufficient in Madison's day to avoid offense, it is no longer sufficient. Now the chaplains' prayers must be judicially supervised to keep them out of trouble. As this Court "has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all," *Wallace*, *supra*, 472 U.S. at 53, the scope of the obligation of the government's chaplains not to give offense has extended to the irreligious. Thus, in *Kurtz v. Baker*, 644 F. Supp. 613 (D.D.C. 1986), a federal district court dismissed a lawsuit brought by a secular humanist complaining about the contents of the Senate Chaplain's prayers only after the Senate Chaplain apologized for any perceived disparagement of non-theists in his prayers and pledged to refrain from potentially offensive remarks in the future. With respect to the congressional chaplaincies at least, the courts have out of necessity entered into "the business of writing or sanctioning official prayers." *Engel*, *supra*, 370 U.S. at 421.

The congressional chaplaincies show that government support is a crutch that can cripple religion. Moreover, government support demeans religion, even if it is only a temporary alliance in the context of a "rite of passage." Brief for the United States at 24. Use of religion at the significant right of passage at issue in the instant case not only sends the unmistakable message that religion has the government's endorsement, but it also reduces religion to the status of the government's ceremonial prop. This use of religion as "an engine of Civil policy" results in "an unhallowed perversion" of religion. Memorial and Remonstrance, *supra*, para. 5. Use of

prayers at public school ceremonies subjects the priest, rabbi or minister to a scrutiny similar to that to which the congressional chaplains must submit. In the instant case for example, those offering prayers were to adhere to "Guidelines for Civil Occasions," that specify that graduation prayers must exhibit "inclusiveness." Toleration of others' beliefs is, of course, an important and essential virtue in our democracy, but this virtue is misapplied when government supervises the writing of prayers.

The government supervision necessary to ensure the "inclusiveness" of prayers in today's religiously diverse society threatens the independence and vitality of religion. Observers from De Tocqueville to the present have remarked on how the "complete separation of church and state" has invigorated religion in this country whereas the support of religion, through state ceremonies and other means, has weakened religious faith in many European countries. A. De Tocqueville, *Democracy in America* 295 (G. Lawrence trans., J. Mayer ed., 1969). *See also* G. Gallup, *Religion in America* 8 (1984) (Americans' "beliefs are intact, whereas a decline in beliefs has occurred in certain Western European nations"); Martin, *Revised Dogma and New Cult*, 111 Daedalus 53, 54-55 (1982) (vitality of religion is low in countries in which religion receives state support); M. Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* 11 (1965) (strength of religion in America derives not from "favoring acts of government, but, in largest measure, from the continuing force of the evangelical principle of separation"). Routinely incorporating generic prayers within state functions risks creating a sense of ennui with—if not disdain for—religious observances and beliefs. Prayers drained of vibrancy through government supervision will not inspire religious faith, whatever civil purpose they may serve. An attempt to be offensive to none results in a prayer meaningless for all. "Civil religion" is an oxymoron.

Equally appalling is the fate of those clergy who refuse to omit sectarian references from their prayers. They will not be called to provide "inclusive" invocations. A state blacklist of clergy who refuse to express their faith in what the state considers appropriate language is a chilling prospect. The Establishment Clause was designed to prevent government from making persons "speak only the religious thoughts that government want[s] them to speak and to pray only to the God that government want[s] them to pray to." *Engel*, *supra*, 370 U.S. at 435.

The "complete separation between the state and religion is best for the state and best for religion." *Everson*, *supra*, 330 U.S. at 59. This principle, articulated in Justice Rutledge's dissent, has been recognized as expressing the sense of all nine Justices in *Everson*, *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 210-11 (1948), and has been "consistently reaffirmed" by this Court. *Abington School District*, *supra*, 374 U.S. at 217. The Court should continue to apply this principle.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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